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Donald S. Murphy

Thomas Schwen

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THE FUTURE: TRANSITIONING FROM TRAINING LAWYERS TO IMPROVING THEIR PERFORMANCE

Donald S. Murphy* & Thomas Schwen†

The Indiana Supreme Court's minimum continuing legal education ("CLE") standards were promulgated twenty years ago, ostensibly to promote competence and professional development. After twenty years, what are the observable outcomes of a mandatory continuing legal education system? Have the standards really produced heightened competence and professional development? Based on our information, we find scant evidence that the court's minimum continuing legal education standards have promoted competence or professional development in a meaningful way. We found lawyers who attend CLE programs do acquire new knowledge but do not retain it and seldom apply the newly acquired knowledge in their work. We argue that the court's standards have resulted in the perfunctory accumulation of CLE credits by attorneys.

After examining the literature on transfer of knowledge in adult learners and using adult learning principles to assess Indiana's CLE training, we inferred that lawyer performance changes very little—if at all—after attending CLE training. It appears that much time and money has been devoted to a CLE system for training lawyers that does not improve performance. This Article offers an alternative model for the training of criminal defense attorneys. The model shifts the focus from the accumulation of CLE credits to actually improving performance.

Typically, CLE providers treat training as an "event." CLE providers in Indiana utilize a common approach in training, which includes variations on the following: select a topic, find a subject matter expert, gather materials, create an outline, advertise the event, rehearse, and deliver.¹ Ostensibly, these activities will lead to improved lawyer

* M.S.O.D. and J.D. Mr. Murphy is the Director of Performance Improvement for the Indiana Public Defender Council. He oversees the training of most of Indiana's 1300 public defenders and consults with public defender managers throughout the state on organization effectiveness issues. Prior to law school, he spent ten years with General Motors Corporation in various management positions. He has authored four manuals for public defenders and collaborated with Professor Thomas Schwen to devise a "Personal Coaching" program for criminal defense lawyers. The program was recognized as a "Best Practice" program by the Bureau of Justice.

† Ed.D. and Professor at the Graduate School of Education at Indiana University, Bloomington. Professor Schwen has consulted with more than one hundred corporations and government agencies. He conducts research on issues of learning and organizational

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competence (knowledge, habits, and skills). The seminar speakers focus on communicating information to the audience. At many CLE programs, the speakers act as if they are “Sages on the Stage” rather than “Guides on the Side.”² The speakers seem to believe that the more information they communicate, the more the participants will learn.

We contend that the perpetuation of Indiana’s current CLE system does not promote the attainment of professional development and competence. Even in skills-based CLE programs where participants practice and receive feedback on their performance, sustainable gains in performance are not the norm. The missing link in Indiana’s traditional approach is attentiveness to the cultural factors that interfere with lawyers applying their new knowledge *after* the training event.

We hypothesize that it is what happens after the training event that leads to sustained improvements in competency and professional development. In order for training to improve lawyer performance, one must tend to the barriers to performance, namely, the learner’s mindset and behavior, as well as the legal culture in which he practices. All these factors must be tended to in conjunction with the training itself. To test this hypothesis, we selected the public defender population and organized a team to analyze performance barriers within their practice area.³ After exploring the mindset, behavior, and culture of public defenders, we created a professional development structure.⁴ The outcome was a sixteen-week personal coaching program that included feedback, problem-solving, and peer-based learning.⁵ The coaching program was a guided effort over time to integrate the knowledge,

performance. Professor Schwen has served on the editorial boards of most journals in his field and is one of the most active dissertation supervisors in the history of his field. He has won national awards for teaching and service.

¹ We will term this the “traditional” approach.

² HAROLD D. STOLOVITCH & ERICA J. KEEPS, TELLING AIN’T TRAINING (Am. Soc’y of Training and Dev. 2002).

³ The design team included Professor Schwen. *See supra* note †. The team also included four associates of the Indiana Public Defender Council: Jodie English (Training Director), Terrence Richmond (former Training Coordinator), Larry Landis (Executive Director), and Don Murphy. *See supra* note *.

⁴ *See* N. Hara, Social Construction of Knowledge in Professional Communities of Practice: Tales in Courtrooms (2000) (unpublished Ph.D. dissertation, Indiana University) (on file with author); Donald S. Murphy, Indicators of Organizational Learning in a Public Defender Office (2005) (unpublished Master’s thesis, Pepperdine University) (on file with author).

⁵ *See* INDIANA COMM’N FOR CONTINUING LEGAL EDUCATION, EFFECTIVE REPRESENTATION OF PEOPLE CHARGED WITH CRIMES Course 005165 (July 14, 2000). This was approved for 32.0 hours of CLE credit, including 3.0 hours of ethics credit.

habits, and skills of effective criminal defense lawyers. Through one-on-one coaching with skilled criminal defense lawyers, participants applied new knowledge and newly acquired skills to their actual cases.

As the thought leaders in the Indiana bar reflect upon attorney training in the twenty-first century, this Article offers an alternative professional development model and a novel approach to training. It has been successful with criminal defense lawyers and it may have applicability to other trial lawyers—if not to the entire legal profession. The Article explores four topics. First, we offer several unintended consequences of linking training to mandatory CLEs.⁶ Next, to underscore the need for changing the current training framework, the Article identifies barriers to performance within the legal culture.⁷ Third, we explain our framework for training: a specific performance-based solution valued by public defenders.⁸ Finally, we suggest that the Indiana Supreme Court and CLE providers reduce their emphasis on training and instead place the emphasis on improving performance; this shift to performance will put the focus on service to the client.⁹

I. UNINTENDED CONSEQUENCES OF INDIANA'S CURRENT CLE FRAMEWORK

Well-intended policies typically come with pernicious side effects. According to Professor Jay Forrester's compensating feedback principle, "When someone tries to change one part of a system, it pushes back in uncanny ways, first subtly and then ferociously, to maintain its own implicit goals."¹⁰ The compensating feedback phenomenon is a product of the underlying nature of complex systems and occurs routinely when people try to instill beneficial change. Take a person on a diet: His or her body will seek to maintain its current weight by producing cravings for fattening foods. Similarly, organizations undergoing change will experience resistance as employees circumvent new ways of doing things to hang on to their old ways.¹¹ Forrester argues that the level of complexity and abstraction involved in organizations surpasses what the unaided human mind can grasp. Often unaware of the intricacies of

⁶ See *infra* Part I.

⁷ See *infra* Part II.

⁸ See *infra* Part III.

⁹ See *infra* Part IV.

¹⁰ Lawrence M. Fisher, *The Prophet of Unintended Consequences*, STRATEGY + BUS., Fall 2005, at 3 (interviewing Professor Jay Forrester). Forrester is the Germeshausen Professor Emeritus of Management at MIT's Sloan School of Management and father of system dynamics, a methodology that uses computer-based models to simulate and study the interplay of growth and equilibrium over time. *Id.*

¹¹ *Id.*

changing complex systems, well-intentioned leaders of organizations make inferior decisions based on their own mental models.

The Indiana Supreme Court's imposition of mandatory CLE requirements is an example of leaders making intuitively comforting decisions with unintended consequences. With mandatory CLEs, lawyers are punished for not attending the requisite number of CLE programs.¹² The court simply mandates attendance, in hopes it will lead to improvement in performance.¹³ In addition, this approach presupposes that if lawyers are compelled to attend, they will learn. The court's perspective unfortunately ignores contextual factors of the learning process, such as a person's ability and willingness to learn or unlearn unproductive habits and attitudes. The court's promulgation of CLE standards generated compensating feedback. At almost any CLE event, newspapers and magazines are read and non-seminar related work is done. Such behaviors are forms of resistance and ways lawyers circumvent the requirements. During the month of December, hordes of lawyers attend CLE programs to "get their hours in" before the deadline. These events are the antithesis of education and effective learning environments. Since the institutionalization of mandatory CLEs twenty years ago, nothing has been done to identify sources of lawyers' resistance or to ask their input on ways to improve the system.

Another unintended consequence of Indiana's training framework is that nothing much happens *after* attendance at a CLE training event. The authors studied the Indiana Public Defender Council's ("Council") membership as our sample. Since its creation in 1976, the Council has utilized the traditional approach to training.¹⁴ In the mid-1990s, the Council's training staff wondered if offering CLE training actually translated into better performance by attorneys. From time to time, we heard anecdotal evidence that our training events made a difference in attorney performance. However, we lacked proof. It made no sense to rely on a training approach simply because all lawyers were trained that way.

¹² See IND. ADMISSION & DISCIPLINE R. 29 §§ 3, 10 (as amended July 1, 2005) (providing sanctions up to suspension from the practice of law for failure to complete CLE requirements).

¹³ See Steven Kerr, *On The Folly of Rewarding A, While Hoping For B*, 18 ACAD. MGMT. J. 769 (1975).

¹⁴ See *id.*

Consequently, in 1996, we started collecting feedback from our seminar participants. A survey of 220 public defenders at the Council's Twenty-Sixth Annual Update seminar revealed the following findings:

- (1) Sixty-six percent of the respondents attended CLE programs to fulfill CLE requirements and to absorb information.
- (2) Thirty-three percent attended CLE programs to pick up one or two new ideas, network, or to reinvigorate themselves.

Furthermore, the data we collected indicated a huge learning/transference gap between the knowledge communicated during programs and the application of that knowledge in their daily work. Almost fifty percent of the public defenders surveyed reported that they seldom practice what they learn at CLE programs, and twenty percent reported that they did not know whether they ever practice what they learned. Perhaps up to seventy percent of our seminar attendees who were trained showed no discernible change in their performance. While survey respondents reported that the training sessions provided useful information and techniques, most did not report lasting changes in their skills and knowledge.

Although almost one-half of the participants left our training events with the intention of applying what they learned, the day-to-day demands of practicing law caused them to lose the focus and momentum needed to make lasting changes. This gap typifies the problem with most legal training. Simply put, for various reasons after completing training and returning to their offices, most attorneys do not allow themselves enough practical application and follow-up to create lasting change. This deficiency in learning/transference likely stems from the "inert" knowledge phenomenon.¹⁵ Under the phenomenon, knowledge gained by traditional training and instruction is not utilized in the "real" world.¹⁶

The Research Institute of America found that in general, thirty-three minutes after completion of classroom training, students retain only

¹⁵ Carl Bereiter & Marlene Scardamalia, *Cognitive Coping Strategies and the Problem of "Inert Knowledge"*, in THINKING AND LEARNING SKILLS, VOL. 2: RESEARCH AND OPEN QUESTIONS 65 (Susan F. Chipman, Judith W. Segal & Robert Glaser eds., Lawrence Erlbaum 1985).

¹⁶ *Id.*

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fifty-eight percent of the material covered in the class.¹⁷ On the second day after completion of training, students retain thirty-three percent, and three weeks later, only fifteen percent of the material covered is retained.¹⁸ Similarly, the Franklin Covey Company studied the traditional approach to training and corroborated these findings.¹⁹ In general, adults who attend traditional training events may expect the following results:

- (1) Knowledge gained deteriorates dramatically within a few days after the training;
- (2) Performance dips slightly compared to what it was before the training;
- (3) Customary ways of working prior to the seminar return if the work environment does not support new behaviors.²⁰

Based on the findings from Franklin Covey and Neil Rackam, one may suggest that for instructor-led training, new knowledge not quickly applied is forgotten and performance returns to the same level it was prior to the training.²¹ After a training event, participants may know and talk about the information, but they tend not to act on what is learned to achieve worthwhile, verifiable results. It appears that much time and money is wasted using the training-as-event framework.

Resistance is a by-product of any kind of change, and a major shortcoming of the introduction of mandatory CLE in Indiana was the failure to incorporate change management theory. Change management theory assumes the presence of resistance. People resist change and learning in order to maintain the status quo and to feel secure. Under change management theory, learning is seen as learning the new and unlearning the old.²² Learning is a vital part of every change process and

¹⁷ Jeff Snipes, *Blended Learning: Reinforcing Results*, CHIEF LEARNING OFFICER, Sept. 2005, at 56.

¹⁸ *Id.*

¹⁹ FRANKLIN COVEY CO., *THE EMPOWERED LEARNING MODEL: A PROCESS FOR UNBEATABLE PERFORMANCE IMPROVEMENT* (1998).

²⁰ *Id.* at 6-7.

²¹ See Snipes, *supra* note 17, at 56.

²² See Satu Lähteenmäki, Jouko Toivonen & Merja Mattila, *Critical Aspects of Organizational Learning Research and Proposals for Its Measurement*, 12 BRITISH J. MGMT. 113 (2001).

can result in improved performance.²³ Learning and change management are parallel, simultaneous, and interactive processes. Indiana's CLE framework could benefit from the intermingling of change management theory and adult learning principles.

One of the major domains of learning is instrumental learning: Learning to control and manipulate the environment or other people, as in task-oriented problem solving, to improve performance. Learning implicates a culture, and culture plays a pivotal role in whether learning is resisted or embraced. When change occurs within a system, it does not relate only to the technical aspects, but also to the power structure within the system and its values and culture.²⁴

II. CULTURE: BARRIERS TO LEARNING WITHIN THE PUBLIC DEFENDER COMMUNITY

Learning is significantly impacted by whether or not certain social or cultural factors are in place. Culture is said to be "the set of shared, taken-for-granted implicit assumptions that a group holds and that determines how it perceives, thinks about, and reacts to its various environments."²⁵ A cursory examination of what goes on when lawyers try to improve suggests culture influences the capacity to learn and the direction the learning will take.²⁶ Trial lawyers tend to immerse themselves in their cases and are often isolated from peers who are equally engrossed in their own cases. The fact is that most trial lawyers are autonomous workers and learners.²⁷ Reflecting on these characteristics, one notices the presence of two impediments to learning: working alone and being overscheduled with little time for reflection. In addition, a trial lawyer's expectation of professional independence might be seen as an impediment to learning. Professional independence means that decisions regarding each case are left to the individual attorney, and,

²³ ORGANIZATION DEVELOPMENT AND CHANGE (Thomas G. Cummings & Christopher G. Worley eds., 7th ed., Southwestern 2001).

²⁴ NOEL M. TICHY, MANAGING STRATEGIC CHANGE: TECHNICAL, POLITICAL, AND CULTURAL DYNAMICS (John Wiley & Sons 1983).

²⁵ Edgar H. Schein, *Culture: The Missing Concept in Organization Studies*, 41 ADMIN. SCIENCE Q. 229, 236 (1996).

²⁶ The Indiana Rules of Professional Conduct allude to the power of culture. See IND. R. PROF'L CONDUCT 5.1, cmt. 3 ("In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.").

²⁷ In fact the trial lawyer's behavior is a microcosm of the legal profession, which is permeated with autonomy and self-governance. See IND. R. PROF'L CONDUCT preamble §§ 10, 12.

for many lawyers, independence leads them to disdain feedback on the quality of their advocacy.²⁸

As time permits, public defenders gather informally to exchange “war stories,” but regular processes for information exchange are not the norm. The effect of these cultural manifestations means the knowledge gained by individuals tends to remain personal, is not likely to be used by others, and performance improvement is hampered because the feedback loop is closed. These shared assumptions are never questioned or examined. A profession’s beliefs may spur the recognition of problems or justify the status quo, and beliefs may also inspire innovation or create resistance. All this implies that learning by professionals depends on the culture of beliefs, norms, and professional identities that provide the context of meaning. Culture change can foster dramatic improvement in effectiveness, or it can be the major obstacle that keeps professionals from learning.

Norms—shared, tacit ways of perceiving, thinking, and reacting—were found to have a decisive influence on how these systems operated. Over the last decade, researchers and organizational scholars have used the process of individual change to reinforce cultural change. “[W]ithout the change process becoming personalized, without individuals being willing to engage in new behaviors, without an alteration in the managerial competencies . . . the organization’s fundamental culture will not change.”²⁹ Personal improvement and change is needed to support and facilitate culture change. The beliefs and norms in some ways determine what trial lawyers decide they want to learn. Simply put, learning is unlikely to occur without changing the culture too. What CLE programs need is a creative intervention that may reduce or lower barriers that inhibit learning.

While the dominant perspective emphasizes the acquisition and distribution of knowledge/data, the cultural-symbolic perspective emphasizes knowledge/wisdom creation and how it becomes embedded in rituals and symbolic systems.³⁰ To put it another way, the cultural-symbolic dimension focuses on how members make sense of information

²⁸ See *id.*

²⁹ KIM S. CAMERON & ROBERT E. QUINN, *DIAGNOSING AND CHANGING ORGANIZATIONAL CULTURE* 105 (Addison Wesley 1999).

³⁰ See Mark Addleson, *Resolving the Spirit and Substance of Organizational Learning*, 9 J. ORGANIZATIONAL CHANGE MGMT. 32 (1996).

and events. Theorists such as Spender³¹ and Nonaka and Takeuchi³² highlight the interaction between tacit and explicit knowledge at the individual and group/organizational levels and argue that storytelling is also a tool for the conversion of tacit knowledge to explicit knowledge. Mental models (in the case of individuals), and paradigms and cultural lenses (in the case of organizations embedded in social systems) guide and constrain the questions asked while searching for information, the findings, the sense making, and what is done with the information.

The dominant characterization of CLE programs emphasizes the acquisition and distribution of knowledge/data, and suggests that learning begins with the individual, as the working of a rational, information-based system. The minority perspective emphasizes knowledge/wisdom creation and how it becomes embedded in a profession's rituals and symbolic systems; it sees learning as a socially constructed process. Lave and Wenger argue for "the significance of shifting the analytic focus from the individual as learner to learning as participation in the social world, and from the concept of cognitive process to the more-encompassing view of social practice."³³

III. PERFORMANCE-BASED SOLUTIONS: WHAT DOES WORK AFTER TRAINING

In the legal profession, as well as in the academic professions in general, the transfer of information and knowledge is critically important. However, knowledge for its own sake provides little value. Learners must be able to use knowledge to perform their jobs. Therefore, training needs to focus on facilitating learners' ability to use newly acquired knowledge in the performance of job tasks, and not simply to foster mastery of subject matter. Possessing knowledge is not the same as being able to apply it back on the job.

"Learning cannot be designed," but it can be facilitated.³⁴ Action learning encourages people to take responsibility for their own learning and development and assist others through mutual support.³⁵ Colleagues focus on solving real problems and learning from experience to improve performance. As opposed to having someone who does not

³¹ J.C. Spender, *Organizational Knowledge, Learning and Memory: Three Concepts in Search of a Theory*, 9 J. ORGANIZATIONAL CHANGE MGMT. 63 (1996).

³² Ikujiro Nonaka & Hirotaka Takeuchi, *A New Organizational Structure*, in KNOWLEDGE IN ORGANIZATIONS 99 (Laurence Prusak ed., Butterworth-Heinemann 1997).

³³ *Id.* at 43.

³⁴ ETIENNE WENGER, *COMMUNITIES OF PRACTICE: LEARNING, MEANING, AND IDENTITY* 229 (Roy Pea et al. eds., Cambridge Univ. Press 1998).

³⁵ *Id.*

know their problems try to teach them, action learning encourages meeting together and learning from each other. The idea is that each participant acts as a mirror to help the group recognize what it does not know. The learning should be self-managed and is usually project based and focused on finding a solution. Michael Eraut found that individuals' learning is strongly situated in the work itself and its social and organizational context.³⁶ A researcher examined the contribution of action learning in seven professions and concluded that everybody should have an ultimate focus on continuing learning rather than continuing education.³⁷ Madden and Mitchell report that professionals prefer informal learning, such as action learning, sharing on-the-job experiences, and water-cooler discussions, to formal learning, such as continuing education training.³⁸ One researcher found there is a strong motivation to invest in learning with the support of others, as long as it "was not prescriptive or bureaucratic."³⁹

To be effective, knowledge should be presented in the context of the job to be done, and it should be assessed in terms of performance, not simply memory recall. The field of performance improvement is based on the premise that performance can be improved.⁴⁰

The literature in the field of instructional systems design lauds the advantages of approaching training as a process and not as an event. In fact, effective training occurs when training becomes a process. When training includes preparation, participation, and performance support, and it is carried out in an environment of measurement and accountability, then performance is more likely to improve.⁴¹ The learner's ability to use newly acquired knowledge is best assessed in the performance of job tasks. Four steps are involved to effectively transfer knowledge in a way that ensures it can be used on the job:

³⁶ *Id.*

³⁷ See generally J. GEAR ET AL., *INFORMAL LEARNING IN THE PROFESSIONS* (Univ. of Hull 1994).

³⁸ *Id.*

³⁹ Danny Chesterman, *A Story About Learning Communally* (Mar. 1999) (unpublished paper presented to Kent Conference on Communal Learning, Kent, UK), available at http://www.yfe70.dial.pipex.com/resources/community/a_story_about_learning_communal.htm.

⁴⁰ See Jerry L. Harbour & Julie L. Marble, *How Performance Improves*, 44 *PERFORMANCE IMPROVEMENT* 14–19 (2005) (discussing how performance does and does not actually improve over time and how to calculate the improvement potential of any given performance system).

⁴¹ See generally DAVID A. GARVIN, *LEARNING IN ACTION: A GUIDE TO PUTTING THE LEARNING ORGANIZATION TO WORK* (Harv. Bus. Sch. Press 2000).

- (1) Define competent job performance;
- (2) Identify elements of knowledge that are required for successful performance;
- (3) Present the knowledge in the context of the tasks to be performed on the job, include practice in its application, and provide feedback on that practice; and
- (4) Assess whether the knowledge can be applied to perform actual job tasks (not just whether it can be recalled).⁴²

The first step is to precisely define competent performance. This enables the training to be built around performance objectives that describe what the learner must be able to do, the conditions under which the performance will occur, simulating the actual job performance as closely as possible, and the criteria or standards for competent performance (the level of performance that is expected). Training should equip people to be fully competent, not minimally qualified.

The next step is to identify the knowledge to be included in the training. One of the major reasons why much of knowledge training is not very effective is that the training frequently includes knowledge that does not directly relate to job performance.⁴³ Including the history or theory unattached to job requirements virtually guarantees the inclusion of irrelevant knowledge. The first question should be "What does someone need to be able to do?" rather than "What does someone need to know?" Knowledge items should be described as actions or performances, such as, "recall the types," or "interpret a diagram," instead of as content, such as ethical rules, or a presentation of cross-examination techniques. The training must provide the knowledge or skills to take the learners from where they are now to the point where they can practice the tasks they need to do on the job.

The third step involves presenting and practicing the knowledge in the context of job tasks. According to Paula Alsher, a common mistake in training design is to allocate hours, days, or even weeks to providing knowledge, and then massing the practice at the end.⁴⁴ Learners are not

⁴² *Id.*

⁴³ *See* GARVIN, *supra* note 41.

⁴⁴ *Id.*

given the opportunity to do anything but take notes and discuss content for large blocks of time. This emphasis on content apart from application is not only inefficient, but also increases the likelihood that much of the newly-learned knowledge is forgotten before the opportunity for practice arrives. A better approach is to integrate the knowledge content with the task performance by presenting information—factual knowledge, procedures, errors to watch for, etc.—needed to perform a single task or sub-task, immediately followed by practical application of that information. Practice should be designed to replicate or simulate exactly what the learner will be required to do on the job.

Finally, there must be assessment of knowledge application. Traditional written tests measure the acquisition of knowledge but not the real-world application of that knowledge. The ultimate test must be whether the learner can perform as he or she will need to do on the job. Therefore, the most useful and valid test is to match the requirements stated in the performance objective. Each learner should be asked to demonstrate competence in the performance called for in the objective. This performance-based approach to knowledge acquisition is far more useful and job relevant.

We wanted to test the efficacy of the process approach to training in the “real world” on public defenders. Therefore, we created competencies for effective job performance and created a learning mechanism that incorporated the four steps above.⁴⁵ As a first step, we asked our audience how they perceived the effectiveness of event-based training. To that end, we administered a Self-Perception Survey to learn how Indiana’s public defenders estimated the frequency with which they practice new behaviors they learned at CLE seminars. Only twenty-five percent regularly practice what they learn. How do the other criminal defense lawyers sharpen their skills and prepare for the challenges awaiting them in the next case?

Many rely on one or more of the following methods for their professional development: (1) discussions and problem-solving with colleagues at the tavern, office, or on a listserv; (2) watching other lawyers and learning new tactics; (3) reading professional publications; or (4) participation in CLE programs. Each method has value and facilitates the acquisition of knowledge. Yet, we know that acquisition of

⁴⁵ PERFORMANCE GUIDELINES FOR REPRESENTATION OF JUVENILES IN DELINQUENCY CASES (Ind. Pub. Defender Council, 2004); Donald S. Murphy, Criminal Defense Attorney Checklist (2004) (on file with author); Donald S. Murphy, Performance Guidelines for Criminal Defense Representation (2000) (on file with author).

knowledge does not often lead to application of that knowledge on behalf of clients. Beyond the acquisition and application of knowledge, how do the above activities enhance a lawyer's skill in advocacy?

The adage that practice makes perfect applies in the legal domain as well as in all other fields of professional endeavor. Research shows that incorporating the elements of practice, continuous feedback, and periodic monitoring of performance improves on-the-job performance.⁴⁶ The bulk of skill development occurs by performing and receiving feedback on the performance so adjustments can be made. Other than by participation in the infrequent skills-based CLE programs, none of the four options enumerated in the preceding paragraph include practice, continuous feedback, and periodic monitoring of performance.

As far as we were able to ascertain, most lawyers develop their craft by the "sink or swim" approach, without the benefit of regular feedback immediately after performances. The stakes are too high for criminal defense lawyers not to utilize the best practices for improving their performance. While a professional athlete's poor performance may result in getting "benched" or "cut" from the team, a criminal defense lawyer's poor performance may result in the loss of a client's freedom, or even death. These high stakes led us to look for a proven way to measure and monitor attorney performance. How do we help lawyers to not only gain knowledge, but then also apply it in practice?

"In an ideal world, performance improves as a linear function . . . [the] amount of improvement 'effort' always equates to the amount of improvement 'result.'" ⁴⁷ Of course, this idealized relationship is seldom realized in the real world. In human systems, there is often limited unrealized performance potential available for improvement efforts. There seems to be a fundamental and repeatable set of concepts regarding how performance improves over time. An initially steep relative rise in performance gain is followed by a pronounced slowdown. Such resultant slowdowns are characterized by ever-smaller gains at correspondingly longer intervals. "This 'stalling out' attribute is especially observed in mature performance systems."⁴⁸ Limiting factors are encountered and improvement growth rates slow markedly. Harbour and Marble postulate that every performance system has a theoretical or potential performance capacity limit. ⁴⁹ "Initial

⁴⁶ See Snipes, *supra* note 17; see also FRANKLIN COVEY CO., *supra* note 19.

⁴⁷ See Harbour & Marble, *supra* note 40, at 14.

⁴⁸ See *id.* at 15.

⁴⁹ See *id.* at 17.

improvement efforts in an immature or poorly designed performance system can often result in spectacular gains in performance.”⁵⁰ This phenomenon may explain the improvements attained through our personal coaching program design because, in our opinion, the CLE system is simply a poorly designed performance system.

IV. A PERFORMANCE-BASED SOLUTION FOR PUBLIC DEFENDERS

In a 1998 memo, Larry Landis, Executive Director of the Council, charted a new direction. To be successful at improving legal representation provided at public expense in state courts in Indiana, he believed the Council must improve the performance of our members. Furthermore, to improve performance, training events were inadequate. The Council’s ability to succeed in performance improvement depends on competencies and dispositions toward performance. In the past, our training has not been connected to performance outcomes; instead, it has primarily focused on delivering knowledge and skills. Some of our training is skill based, but not as part of a performance improvement strategy that considers many kinds of interventions. Landis challenged his training staff to focus on performance and view training as one of the many possible interventions that might be used to close a performance gap. Also, because change happens faster than adaptation, closing gaps is not enough. We need to be able to anticipate and prevent gaps from developing. Landis set forth five key elements of performance:

- (1) Results/outputs that make an individual effective;
- (2) Measurable change;
- (3) People with the right skill, knowledge, and behavior to perform as desired;
- (4) Systems and processes that connect work effort to desired results;
- (5) Methods for analyzing and closing gaps between current and desired performance.

⁵⁰ See *id.* at 18.

Table 1 illustrates major differences between a training perspective and a performance perspective.⁵¹

TABLE 1⁵²

TRAINING PERSPECTIVE	PERFORMANCE PERSPECTIVE
<i>Assumptions</i>	<i>Assumptions</i>
Training (giving people more skill, knowledge, or ability) is the solution to performance problems.	Training is one possible intervention when there are performance problems.
The goal of training is to give people more skill, knowledge, or ability.	The goal of performance is to meet performance goals.
A training department should deliver the training that customers ask for.	A performance improvement department should question whether training is the most appropriate intervention.
A trainer's most important skill is to deliver training and facilitate learning.	A performance improver's most important skill is to diagnose performance problems.
<i>Roles</i>	<i>Roles</i>
Training needs analysis	Performance analysis/diagnosis
Training design	Cause analysis Intervention
Training delivery	Change implementation
Evaluation	Evaluation and feedback
Training management and coordination	Project management
<i>Measures</i>	<i>Measures</i>
Reaction of participants	Measures
Capability after training	Effect on performance gap
Transfer of learning to job	Achievement of goal

Adopting a performance perspective requires diagnosing before prescribing. The training-as-event solution prescribes training before diagnosing what the problem is. Or, in the worst-case scenario, training is seen as the solution anytime there is a performance problem. It is

⁵¹ See *supra* Parts I-III.

⁵² Table derived from *supra* Parts I-III.

similar to the bromide, “if all you have is a hammer, everything starts to look like a nail.” In diagnosing a performance problem, there are many factors to consider:

- (1) The performance required by accepted performance standards.
- (2) The support processes that affect the required performance.
- (3) The outputs those processes must produce.
- (4) The outputs and performance each performer must produce.
- (5) How each job or set of tasks should be performed.
- (6) The performance environment for each job.
- (7) The management processes that affect the targets for improvement.
- (8) The organization’s structure.
- (9) The information each performer needs.

We considered these factors in our model of professional development and crafted an approach to training that includes the following elements:

- (1) Knowledge: Information delivered in small increments over time. Principles and concepts presented are relevant and applicable to the personal needs of each participant.
- (2) Application: Help participants apply principles and concepts to their unique situations. Learning occurs step by applied step.
- (3) Accountability: Strong relationship of personal accountability. Objectives established, goals set, and commitments are made and followed up on.

- (4) Motivation: The drive to learn and change. As performers apply principles and experience benefits of new behaviors, motivation shifts from external to internal.
- (5) Time: To internalize concepts and make lasting changes. Gives people time to think about concepts, practice principles, get feedback, make adjustments, overcome stumbling blocks, and try again.

The absence of these factors in many current CLE programs indicates that the shift to performance improvement might be a challenge for some CLE providers. This approach differs substantially from the traditional approach to training lawyers. Experts in adult education assert that experiential training (training that occurs in the actual work environment) is the most effective way to acquire and sustain skills. Also, adults have an increased commitment to professional development when they are involved in the design of their learning experiences.⁵³

Since 1998, Indiana's public defenders have had access to personal coaching and structured practice sessions just like professionals in other professions. The Council's Personal Coaching Program encourages lawyers to take responsibility for their professional development by active involvement in the acquisition and/or refinement of knowledge and skills. The coaching is not a training event, it is a process. The program is a guided effort over time to integrate the knowledge, habits, and skills of effective criminal defense lawyers. The objectives of the program were twofold:

- (1) Increase the effectiveness and performance capability of public defenders, and
- (2) Create Communities of Practice in which public defenders hold themselves accountable for their own professional development.

The lawyer and the coach identify performance barriers, customize developmental plans, apply new behaviors in actual criminal cases, and receive feedback on their performance. This one-on-one approach fosters candid discussions about the lawyer's strengths and

⁵³ See generally MALCOLM S. KNOWLES, *THE ADULT LEARNER: A NEGLECTED SPECIES* (Gulf Pub. Co. 1990).

developmental areas. In addition, the personalized approach helps integrate core knowledge, skills, and abilities into the lawyer's individual style. Periodic consultation and support continue after formal completion of the program.

The coaching sessions are held for two hours each week for sixteen weeks, and the coach works with the attorney on his or her actual cases. Participants report that it is a great way to learn, grow, and receive performance feedback in a supportive setting. Not everyone who completes the program will have the courtroom presence of Clarence Darrow, but he or she will be a more skillful practitioner in that the attorney will have more skills, possess a deeper understanding of how to litigate to his or her strengths, and know how to implement specific strategies that enhance performance. Most importantly, we assert that the attorney will have experienced continuous applied learning.

The benefits of this program are manifold. First, the lawyer will address the critical issues affecting his or her performance. Second, a professional personal coach provides help in thinking through choices, challenging perceptions, and bringing the lawyer closer to his or her individual level of peak performance. Third, the attorney develops a workable plan and takes steps to effectively continue professional development throughout his or her career.

V. THE FUTURE OF TRAINING LAWYERS

The learning context of lawyers has shifted from apprenticeships under practicing attorneys, to law schools training pubescent lawyers, to a recent emphasis on continuing legal education programs to bolster lawyer professional development. We suggest that mandatory CLE programs in Indiana suffer from the "inert" knowledge phenomenon, and this lack of transference of knowledge has a negative impact on learning.⁵⁴ In adult education literature and practice, the focus of learning is moving away from individuals and towards groups. In fact, significant learning and innovation have been shown to occur in the informal communities of practice where people work, and not in classrooms.⁵⁵ A shift in the direction of learning groups might benefit practicing attorneys and result in more transfer of knowledge.

⁵⁴ *Id.*

⁵⁵ See generally J.S. BROWN & P. DUGUID, *Organizational Learning and Communities of Practice: Towards a Unified View of Working, Learning, and Innovations*, in ORGANIZATIONAL LEARNING 58 (Michael Cohen & Lee Spruill eds., Sage 1991).

Simply attending a training seminar is not enough. To be effective, the lawyer needs to know how to improve in her representation of clients and there must be a responsibility for ascertaining that the lawyer has successfully applied the learning to client representation. Communities of practice might serve as the gateway to performance improvement. Continuing professional development is associated with "learning activities that are undertaken throughout working life . . . to enhance individual and organizational performance in professional and managerial spheres."⁵⁶

Brown and Duguid paint a rich picture of how knowledge is shared in communities of practice.⁵⁷ The transmission of formal "codified" knowledge gives way to storytelling as "data" become embedded in an explanatory narrative, which also serves a community-building function. Storytelling is a key to fostering knowledge among people because it is situated and improvisational and develops a shared understanding. In telling the stories, participants contribute to the construction and evolution of "communities of interpretation," and through the continual development of these communities, the shared means for interpreting complex activity is formed, transformed, and transmitted. These two theorists note that communities of practice differ from formally structured organizational units in that their borders are fluid and emergent, and are in fact defined by who shares what kind of information with whom.⁵⁸ Within these loose boundaries, trust and one's status as a credible practitioner/informant and/or "legitimate peripheral participant," i.e., insider-learner, become important features that influence the exchange of information and knowledge. The Association of Southern Indiana Criminal Defense Attorneys has created a vibrant community of practice.⁵⁹ Their community has successfully addressed systemic issues that affect indigent representation in their region, they have sponsored dialogues with judges and other members of the criminal justice system, and they have instituted a variety of interventions to help lawyers attain the highest level of skill.

⁵⁶ Ian Woodward, *Dimensions of Continuing Professional Development*, in CONTINUING PROFESSIONAL DEVELOPMENT: ISSUES IN DESIGN AND DELIVERY 1, 1 (Ian Woodward ed., Cassell 1996).

⁵⁷ See BROWN & DUGUID, *supra* note 55.

⁵⁸ *Id.*

⁵⁹ Started in 1997. Members include criminal defense lawyers from Clark, Floyd, Harrison, Scott, and Washington Counties in Indiana and Jefferson County in Kentucky. Contact Michael J. McDaniel for more information. E-mail: mjmnalaw@sbcglobal.net or telephone: 812 948-1707. Also, the authors are aware of criminal defense communities of practice in Allen, Lake, Vanderburgh, Knox, and Boone counties.

VI. CONCLUSION

Under the modernist stream of learning theory, collectivity and social structure are not regarded as significant components of learning.⁶⁰ We maintain that a profession's culture plays a pivotal role in whether learning is resisted or embraced. The crucial question is: In what ways do the members of the profession facilitate or inhibit learning? The Indiana Supreme Court stated: "A lawyer should strive to attain the highest level of skill, to improve the law and the legal professional and to exemplify the legal profession's ideals of public service."⁶¹ We wonder whether the current mandatory CLE system promotes attainment of the highest level of skill. This Article argued that learning is a social process, and individuals constantly interact with one another and within that context.⁶² Values, norms, activities, interactions, and sentiments cannot be excluded. The legal profession and its leadership might consider focusing on the creation of compatible and shared meanings to blend the legal culture into learning frameworks. Action research provides an alternative view for bar leaders, consultants, trainers, and CLE providers who may typically focus on formal training.

There is an on-going debate in the education and training professions on how to design learning environments so that learners engage in practice in social contexts. We would argue that designers consider dropping "design" of learning and focus on the facilitation of learning. Learning applied in every day practice changes the process of professional development from acquiring knowledge in the abstract to solving everyday problems of practice. Our claim is that we can advance the practice of law by converting the problems of everyday practice into an agenda for change.

We suggest that the legal community explore its ideas, beliefs, and social systems regarding learning/training. It is important to tend to the boundaries within which a particular kind of learning takes place, the central purpose that serves as the organizing force for learning, and the mechanisms that drive and distribute learning.⁶³

⁶⁰ *Id.*

⁶¹ IND. R. PROF'L CONDUCT preamble § 7.

⁶² See generally Walter Mischel, *Toward a Cognitive Social Learning Reconceptualization of Personality*, 80 PSYCHOLOGY REV. 252 (1973).

⁶³ See generally George P. Huber, *Organizational Learning, the Contributing Processes and the Literature*, 2 ORGANIZATION SCIENCE 89 (1991).

APPENDIX

PROGRAM EVALUATION OF THE INDIANA PUBLIC DEFENDER COUNCIL'S PERSONAL COACHING PROGRAM BY ITS GRADUATES



